

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRIAN BALLENTINE, *et al.*,

Case No.: 2:14-cv-01584-APG-EJY

## Plaintiffs

v.  
LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, *et al.*.

## Defendants

# **Order Granting Defendant Christopher Tucker's Motion for Summary Judgment**

[ECF No. 227]

Plaintiffs Brian Ballentine, Catalino Dazo, and Kelly Patterson<sup>1</sup> brought this civil rights  
suit against the Las Vegas Metropolitan Police Department (Metro) and some of its officers,  
alleging claims under 42 U.S.C. § 1983, the Nevada Constitution, and Nevada law. I previously  
denied in part the defendants' motion for summary judgment. ECF No. 207. The only  
remaining claim is a First Amendment retaliatory arrest claim against Metro Detective  
Christopher Tucker. The plaintiffs allege that Tucker violated their First Amendment rights by  
providing them for writing anti-police messages on sidewalks with chalk.

Tucker now moves for summary judgment, arguing that he is entitled to qualified immunity because probable cause existed for the arrests. Both parties' arguments rely on the Supreme Court of the United States' recent decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). Tucker's motion for summary judgment because he is entitled to qualified immunity.

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<sup>1</sup> Plaintiff Gail Sacco died on August 27, 2019. ECF No. 228. The plaintiffs filed a suggestion of death on September 17, 2019. More than 90 days have passed, and no one has moved to substitute as Sacco's successor or representative. I therefore dismiss her from this action. Fed. R. Civ. P. 25(a)(1).

1 **I. BACKGROUND**

2 Ballentine, Dazo, and Patterson are members of the “Sunset Activist Collective,” a local  
3 activist group. ECF Nos. 176-2 at 10; 176-3 at 11. The plaintiffs have carried out chalking  
4 protests on Las Vegas sidewalks since 2011, some of which involved anti-police themes and  
5 some which did not. ECF Nos. 176-3 at 11; 176-2 at 10-19, 22; 177-5 at 22. Most of these  
6 protests occurred without police interference or with police interaction that did not result in a  
7 citation or arrest. *See* ECF No. 177-5 at 33-39. At one event in October 2012, the marshals at the  
8 Regional Justice Center (RJC) gave the plaintiffs permission to chalk on the sidewalk so long as  
9 they did not chalk the building or the steps. ECF Nos. 177-5 at 33-34; 176-2 at 4; 178-1 at 19-20.  
10 The plaintiffs never cleaned up the chalk at their various protests. ECF No. 177-5 at 23.

11 On June 8, 2013, the plaintiffs were using chalk to write messages that were critical of  
12 Metro on the sidewalk in front of Metro’s headquarters. ECF No. 176-3 at 8. Sergeant Mike  
13 Wallace approached the plaintiffs, told them that graffiti on the sidewalk is against the law, and  
14 asked them to stop. ECF No. 175-1 at 41. When it became clear the plaintiffs were not going to  
15 cease chalking, Wallace issued a citation to each plaintiff. ECF No. 175-1 at 53-55. The  
16 plaintiffs responded that Wallace was wrong and that chalking on the sidewalk was not against  
17 the law. ECF No. 176-2 at 23. Patterson requested to speak with a supervisor, so Wallace  
18 contacted Lieutenant John Liberty to respond to the scene. ECF Nos. 175-3 at 25-27; 176-2 at  
19 23. On the way, Liberty consulted with a state court judge, a deputy district attorney, and an  
20 internal affairs detective to determine whether sidewalk chalking was a crime under Nevada’s  
21 graffiti statute, Nevada Revised Statutes § 206.330. ECF No. 175-3 at 29-30. Each of those  
22 individuals opined that writing on a public sidewalk with chalk was a crime. *Id.*  
23

1       The graffiti citations that Wallace issued were assigned to Detective Tucker to  
2 investigate. ECF No. 175-4 at 12-13. The chalk was still on the sidewalk a few days later, and  
3 Tucker saw that it listed names of police officers and referred to murders. *Id.* at 13. As part of  
4 Tucker's investigation, he monitored the plaintiffs' social media to track their activities, as he  
5 does in other graffiti cases. *Id.* at 14. Tucker learned from the plaintiffs' social media that they  
6 referred to themselves as the Sunset 3 and were part of the Sunset Activist Collective, which was  
7 known to be associated with protest groups Nevada CopBlock and Occupy LV. *Id.* at 35.

8       The Las Vegas City Attorney's Office declined to prosecute the citations. ECF No. 190-3  
9 at 3. Assistant Deputy City Attorney Benard Little concluded that sidewalk chalk did not fall  
10 within the statute because it was "easily removed" and therefore did not deface the property. *Id.*  
11 Little also suggested there was no intent to deface and thus criminal intent was lacking. *Id.*  
12 Finally, Little expressed his concern about First Amendment issues related to "complaint based  
13 graffiti enforcement" because that "necessarily centers around the content of any message which  
14 the First Amendment of the U.S. Constitution clearly prohibits." *Id.* Clark County Chief Deputy  
15 District Attorney Scott Mitchell was then contacted for a second opinion. ECF No. 190-4. In  
16 Mitchell's opinion, chalking was a crime under § 206.330, and if abatement costs were over  
17 \$250, then it would be a gross misdemeanor. *Id.*

18       On July 13, 2013, Ballentine and Patterson chalked more messages critical of Metro on  
19 public sidewalks in front of Metro's headquarters. ECF Nos. 175-4 at 17-18, 20; 176-2 at 27.  
20 Metro Detective William Matchko observed the plaintiffs but did not have time to stop and  
21 address them. ECF Nos. 190-1 at 98-99; 192-1; 191-3. No officer approached the plaintiffs on  
22 that date. ECF No. 176-2 at 28. Matchko indicated in an email to Tucker and others that if  
23 someone prepared an arrest warrant, he would identify the plaintiffs. ECF No. 191-3.

1 On July 18, Patterson, Ballentine, and Dazo appeared at the RJC for the hearing on the  
2 citations, but the citations were not prosecuted. ECF No. 177-5 at 40. They then chalked  
3 messages critical of Metro in front of the RJC. ECF Nos. 175-4 at 24-26; 176-2 at 28-29; 177-5  
4 at 40. Plaintiff Gail Sacco was at the event but stayed in her car for fear of being arrested or  
5 cited. ECF Nos. 176-2 at 28-29; 179-2 at 9-10. Ballentine and Patterson claim that others,  
6 including children, were also chalking. ECF Nos. 178-3 at 32; 178-4 at 7.

7 Tucker was at the RJC and he asked Ballentine if the plaintiffs were going to clean up  
8 after themselves when they were done. ECF No. 175-4 at 26-27. Ballentine did not respond. *Id.*  
9 Tucker told the protestors that one of the messages written in chalk was inaccurate because the  
10 message stated no police officer had ever been put on trial, but Tucker stated one had been. ECF  
11 Nos. 176-2 at 29; 177-6 at 2. According to Patterson, an unidentified officer was trying to get  
12 personal information from the protestors. ECF No. 176-2 at 29. Tucker took pictures of the  
13 chalk messages, some of which contained profanity and referred to officer-involved shootings.  
14 ECF No. 175-4 at 27. No one told the plaintiffs they could not chalk on the sidewalk that day.  
15 ECF No. 177-6 at 2.

16 Tucker prepared a declaration of arrest relating to the July 13 and July 18 incidents. ECF  
17 No. 175-4 at 34. In the declaration of arrest, he referred to the content of the messages, including  
18 “fuck pigs” and “fuck the cops.” *Id.* Tucker testified at his deposition that he put that  
19 information in the declaration of arrest to give context. *Id.* at 36.

20 On August 9, 2013, a criminal complaint was filed against Patterson, Ballentine, and  
21 Dazo for gross misdemeanors of conspiracy to commit placing graffiti and placing graffiti on or  
22 otherwise defacing property. ECF No. 176-5 at 25. They were charged with two counts of each  
23

1 crime based on the July 13 and July 18 incidents. *Id.* The criminal complaint referred to the fact  
2 that the alleged graffiti included “derogatory statements and profanity. . . .” *Id.* at 26.

3       The next day, Ballentine and Patterson appeared at another planned protest where they  
4 were arrested. ECF No. 176-2 at 31-32. Dazo was not at the protest and was never arrested. ECF  
5 No. 176-3 at 9. The Clark County District Attorney dropped the charges after learning that  
6 officers were present at the RJC but did not tell the plaintiffs to stop, and some officers or  
7 marshals possibly told the plaintiffs where they could and could not chalk. ECF No. 178-1 at 11.  
8 The District Attorney also decided that a prosecution was not a good use of limited resources. *Id.*  
9 The plaintiffs then filed this civil rights lawsuit against Wallace, Liberty, Tucker, and Metro.  
10 The only remaining claim is the First Amendment retaliatory arrest claim against Tucker.

11 **II. DISCUSSION**

12       Summary judgment is appropriate if the movant shows “there is no genuine dispute as to  
13 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
14 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.”  
15 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence  
16 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

17       The party seeking summary judgment bears the initial burden of informing the court of  
18 the basis for its motion and identifying those portions of the record that demonstrate the absence  
19 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
20 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
21 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
22 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat  
23 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material

1 fact that could satisfy its burden at trial.”). However, when the moving party “bears the burden  
2 of persuasion at trial, to prevail on summary judgment it must show that the evidence is so  
3 powerful that no reasonable jury would be free to disbelieve it.” *Shakur v. Schriro*, 514 F.3d 878,  
4 890 (9th Cir. 2008). I view the evidence and reasonable inferences in the light most favorable to  
5 the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir.  
6 2008).

7 Tucker asserts qualified immunity as an affirmative defense. Qualified immunity  
8 protects government officials from money damages unless (1) the plaintiff presents evidence  
9 from which a reasonable jury could find that the official violated a statutory or constitutional  
10 right, and (2) the right was clearly established at the time of the challenged conduct.  
11 *Tuuamalemalo v. Greene*, 946 F.3d 471, 476-77 (9th Cir. 2019). “Summary judgment on  
12 qualified immunity is not proper unless the evidence permits only one reasonable conclusion.”  
13 *Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082, 1087 (9th Cir. 2000).

14 **A. First Amendment Retaliation**

15 The first prong of qualified immunity requires me to determine whether, viewing the  
16 facts in the light most favorable to the plaintiffs, a reasonable jury could find that Tucker  
17 violated the plaintiffs’ First Amendment rights. Tucker argues that the plaintiffs have failed to  
18 establish that he violated their constitutional rights because, under the Supreme Court’s decision  
19 in *Nieves v. Bartlett*, the presence of probable cause defeats the plaintiffs’ First Amendment  
20 retaliatory arrest claim. He also argues that the plaintiffs have not shown that he wanted to chill  
21 their speech and that this desire was the but-for cause of the arrests. The plaintiffs respond that  
22 Tucker cannot demonstrate there was probable cause to arrest or cite them and that Tucker had  
23 arrested them because of the content of their speech. They contend that even if Tucker had

1 probable cause, their claim survives under *Nieves* because chalking on a sidewalk is generally  
 2 insufficient to provoke an arrest.

3 To establish a First Amendment retaliation claim, the plaintiffs must demonstrate that  
 4 (1) they engaged in a constitutionally protected activity; (2) as a result, they were subjected to  
 5 adverse action by the defendant that would chill a person of ordinary firmness from continuing to  
 6 engage in the protected activity; and (3) there was a substantial causal relationship between the  
 7 constitutionally protected activity and the adverse action. *Blair v. Bethel Sch. Dist.*, 608 F.3d  
 8 540, 543 (9th Cir. 2010). It is undisputed that the plaintiffs were engaged in protected speech  
 9 activities when they used chalk to write their messages on city sidewalks. I previously ruled that  
 10 citing and arresting the plaintiffs would chill a person of ordinary firmness. ECF No. 207 at 10  
 11 (citing *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013)); *see also Lacey v. Maricopa*  
 12 *Cnty.*, 693 F.3d 896, 917 (9th Cir. 2012) (holding that arresting someone in retaliation for the  
 13 exercise of free speech rights is sufficient to chill speech). I also ruled that Tucker had probable  
 14 cause for the arrest. ECF No. 36 at 2, 9-11. Consequently, what remains is whether the existence  
 15 of probable cause defeats the third element, causation.

16 In *Nieves*, the Supreme Court held that probable cause for an arrest will generally defeat a  
 17 retaliatory arrest claim because the presence of probable cause suggests that the arrest was  
 18 objectively reasonable and that the officer's animus is not what caused the arrest. 139 S. Ct. at  
 19 1724-26. However, the Supreme Court held that

20 a narrow qualification is warranted for circumstances where officers have  
 21 probable cause to make arrests, but typically exercise their discretion not to do so.  
 22 In such cases, an unyielding requirement to show the absence of probable cause  
 23 could pose a risk that some police officers may exploit the arrest power as a  
 means of suppressing speech.

*Id.* at 1727 (citation omitted). Thus, to establish a First Amendment retaliatory arrest claim when  
 probable cause exists, a plaintiff must show objective evidence that he was arrested for

1 committing a crime (e.g., jaywalking) while engaged in protected speech while others  
2 committing the same crime but not engaged in protected speech were not arrested. *Id.* This  
3 showing helps establish that non-retaliatory grounds were insufficient on their own to provoke  
4 the arrest. *Id.*

5 After making that showing, the plaintiff's claim may proceed in the same manner as  
6 claims where there was no probable cause. *Id.* When the plaintiff has shown the absence of  
7 probable cause, his claims are governed by the test in *Mt. Healthy City Board of Education v.*  
8 *Doyle*, 429 U.S. 274 (1977). *Id.* at 1725. Under this test, once the plaintiff shows that retaliation  
9 was a substantial or motivating factor for the arrest, ““the defendant can prevail only by showing  
10 that the arrest would have been initiated without respect to retaliation.”” *Id.* (quoting *Lozman v.*  
11 *Riviera Beach*, 138 S. Ct. 1945, 1952-53 (2018)).

12 Here, the plaintiffs have presented evidence from which a reasonable jury could conclude  
13 that they were arrested for chalking while others who chalked but did not engage in the same sort  
14 of protected speech had not been arrested. The plaintiffs' attended at least nine chalking protests  
15 between 2011 and 2013 where they were not cited for chalking and were not told by law  
16 enforcement officers that chalking on a city sidewalk is illegal. See ECF No. 177-5 at 33-39.  
17 The plaintiffs were first cited two years after they began their chalking protests. ECF No. 175-1  
18 at 53-54. The City Attorney declined to prosecute those citations because he found that sidewalk  
19 chalk did not fall within the graffiti statute and he was concerned about First Amendment issues  
20 related to the citations. ECF No. 190-3 at 3. The plaintiffs also presented evidence that other  
21 individuals were chalking at the RJC and there is no evidence those people were arrested.

22 Tucker concedes that other Metro “officers may have acted differently” when addressing  
23 an individual chalking on the sidewalk. ECF No. 236 at 4. Although he argues that the plaintiffs

1 have not shown that he selectively enforced the statute against them, *Nieves* directs me to look to  
2 whether Metro officers typically arrest individuals for chalking on sidewalks, not whether  
3 Tucker usually arrests people for doing so. Tucker presents no evidence that Metro has ever  
4 arrested anyone besides the plaintiffs for chalking on the sidewalk. And because a reasonable  
5 jury could find that officers typically exercise their discretion not to arrest someone for chalking  
6 on sidewalks, the plaintiffs' claims fall within the selective enforcement exception in *Nieves*.  
7 Consequently, the *Mt. Healthy* test applies.

8 The plaintiffs have met their initial burden under that test by presenting evidence from  
9 which a reasonable jury could conclude that the anti-police content of the chalkings was a  
10 substantial or motivating factor for the arrests. Tucker included in his case report information  
11 about the plaintiffs' association with CopBlock. ECF Nos. 192-1 at 2. Tucker saw the plaintiffs  
12 chalking at the RJC but did not tell them to stop. Instead, he took photos and challenged the  
13 content of the messages by disputing the accuracy of their speech. And in the declaration of  
14 arrest, Tucker referred to the content of the messages and sought arrest warrants instead of  
15 simply citing the plaintiffs. A reasonable jury could conclude that the content of the chalkings  
16 was a substantial or motivating factor for the arrests.

17 The burden thus shifts to Tucker to show that he would have arrested the plaintiffs  
18 regardless of the content of their speech. Tucker contends that he included the plaintiffs' anti-  
19 police affiliations in the declaration of arrest to allow the magistrate judge to evaluate any First  
20 Amendment issues related to the arrest. ECF No. 227 at 15-16. He also argues that he sought the  
21 warrants because the citations previously issued to the plaintiffs did not stop them from chalking  
22 on the sidewalk. *Id* at 15. While a jury may credit Tucker's explanations, it also could disbelieve  
23 that Tucker would have arrested the plaintiffs even in the absence of the protected speech given

1 the evidence discussed above. Therefore, the plaintiffs have presented evidence from which a  
2 jury could find that Tucker violated their First Amendment rights.

3       **B. Clearly Established Right**

4       The second prong of qualified immunity requires me to determine whether the plaintiffs'  
5 constitutional rights were clearly established at the time of the arrests. Tucker argues the  
6 plaintiffs' rights, defined according to the particular facts of this case, were not established at the  
7 time of the arrests. He also contends that an intra-circuit split existed at the time of the arrests as  
8 to whether probable cause defeats a retaliatory arrest claim. And he contends the plaintiffs  
9 cannot rely on *Nieves* as clearly established law because that case did not exist at the time he  
10 acted. The plaintiffs respond that the Ninth Circuit established as early as 2006 that an officer  
11 may not arrest an individual in retaliation for that individual's speech. They also contend there  
12 was no intra-circuit split at the time of the arrests.

13       The plaintiff bears the burden of showing that the right allegedly violated was clearly  
14 established. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). To determine that issue, I  
15 look to "Supreme Court and Ninth Circuit law existing at the time of the alleged act."  
16 *Community House, Inc. v. City of Boise*, 623 F.3d 945, 967 (9th Cir. 2010). "A right is clearly  
17 established only if its contours are sufficiently clear that a reasonable official would understand  
18 that what he is doing violates that right." *Carroll v. Carman*, 574 U.S. 13, 16 (2014) (quotation  
19 omitted). Although there need not be "a case directly on point, . . . existing precedent must have  
20 placed the statutory or constitutional question beyond debate." *Id.* (quotation omitted). "This  
21 inquiry must be undertaken in light of the specific context of the case, not as a broad general  
22 proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation omitted). Thus, I must not  
23 "define clearly established law at a high level of generality." *Id.* (quotation omitted). "The

1 dispositive question is whether the violative nature of *particular* conduct is clearly established.”  
2 *Id.* (quotation omitted) (emphasis in original). The law is clearly established if it gave the officer  
3 fair warning that his conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

4       The question of whether *Nieves* changed the scope of clearly established law at the time  
5 Tucker acted is a difficult one. In my August 2017 summary judgment order, I stated that the  
6 law was clearly established at the time of these August 2013 arrests because “a reasonable  
7 officer would know that he cannot use his authority to retaliate against someone based on the  
8 content of that person’s speech.” ECF No. 207 at 10. That remains true post-*Nieves*, with the  
9 caveat that if the officer had probable cause for the arrest, the offense must be one that would not  
10 ordinarily provoke an arrest. A reasonable officer in 2013 would know that chalking does not  
11 ordinarily provoke an arrest because there is no evidence that Metro ever arrested anyone for the  
12 offense despite officers observing chalking activity, and even citations for the offense were not  
13 prosecuted. Tucker was on fair notice that he could not make a retaliatory arrest under these  
14 circumstances when he acted in 2013. And that same conduct is still unlawful after *Nieves*, so a  
15 reasonable officer in 2013 would have had fair warning that what he was doing was unlawful.

16       Alternatively, it could be argued that *Nieves* changed the contours of the right at issue,  
17 and so a reasonable officer acting in 2013 would not have known everything he needed to know  
18 to have fair notice that arresting the plaintiffs would violate their First Amendment rights. Prior  
19 to *Nieves*, there was no Ninth Circuit or Supreme Court case advising an officer that if he had  
20 probable cause to make the arrest, the critical fact that would make his conduct unlawful was that  
21 the offense he was arresting the plaintiff for was not one that would ordinarily result in an arrest.

22       I need not resolve this issue. I previously ruled that the right to be free from a retaliatory  
23 arrest even where probable cause existed was clearly established in the Ninth Circuit. But that

1 conclusion has been called into question by subsequent case law. My prior ruling was based on  
2 *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006) and *Ford v. City of Yakima*, 706  
3 F.3d 1188 (9th Cir. 2013). ECF No. 207 at 10. In *Skoog*, which was decided in November 2006,  
4 the Ninth Circuit established that police action motivated by retaliatory animus was unlawful,  
5 even when probable cause existed for that action. The plaintiff in *Skoog* brought a retaliatory  
6 arrest claim alleging that the officer arrested him and searched his property in retaliation for him  
7 photographing and videotaping police activities. *Id.* at 1226-27. The Ninth Circuit determined  
8 that although probable cause existed for the search, the arrestee presented evidence that the  
9 officer's animus against him played a substantial factor in why the officer pursued a warrant for  
10 the search and arrest. *Id.* at 1235. The Ninth Circuit ultimately found that the officer was entitled  
11 to qualified immunity because the "right of an individual to be free of police action motivated by  
12 retaliatory animus but for which there was probable cause" was not clearly established at the  
13 time of the search and arrest. *Id.* But *Skoog* established that, going forward, the right "to be free  
14 of police action for which retaliation is a but-for cause even if probable cause exists for that  
15 action" existed in the Ninth Circuit. *Id.*

16 In *Ford*, the Ninth Circuit held that by July 2007 it was clearly established that police  
17 officers may not arrest an individual to retaliate against protected speech, even if probable cause  
18 exists. 706 F.3d at 1195-96. The arrestee in *Ford* brought a retaliatory arrest claim against police  
19 officers who arrested him after a traffic stop. *Id.* at 1191. The arrestee presented evidence that  
20 the officers chose to arrest him because he yelled at them during the traffic stop and told them he  
21 thought the stop was racially motivated. *Id.* at 1190-91, 1194-95. The Ninth Circuit ruled that  
22 although the officers had probable cause for the arrest, *Skoog* clearly established that probable  
23 cause does not defeat a retaliatory arrest claim because it is unlawful for an officer to retaliate

1 against an individual for his free speech. *Id.* at 1194-96. The Ninth Circuit thus concluded that  
 2 the officers were not entitled to qualified immunity on the arrestee's First Amendment retaliatory  
 3 arrest claim. *Id.* at 1196. Both *Skoog* and *Ford* pre-date the August 2013 arrests in this case.<sup>2</sup>

4 Just a few months after *Ford* was decided but before the arrests in this case, the Ninth  
 5 Circuit issued *Acosta v. City of Costa Mesa*, 718 F.3d 800, (9th Cir. 2013). There, police officers  
 6 arrested the plaintiff in January 2006 for violating a municipal code that prohibited disorderly  
 7 conduct at city council meetings. 718 F.3d at 806-07. Although the Ninth Circuit held the  
 8 municipal code was unconstitutionally overbroad, it concluded the officers were entitled to  
 9 qualified immunity because no clearly established law put them on notice that they could not  
 10 arrest the plaintiff even though they had probable cause. *Id.* at 823-25.

11 Tucker contends *Acosta* created an intra-circuit split, so the law was not clearly  
 12 established at the time he acted. I do not believe *Acosta* created an intra-circuit split because that  
 13 case evaluated whether there was clearly established law at the time of the January 2006 arrest.  
 14 Because the *Acosta* arrest occurred before the Ninth Circuit's decisions in *Skoog* and *Ford*, the  
 15 law was not clearly established at that time that officers may not arrest an individual to retaliate  
 16 against protected speech, even if probable cause existed. But by the time Tucker acted in 2013,  
 17 the law in the Ninth Circuit was clearly established, based on *Skoog* and *Ford*, that officers could  
 18 not make a retaliatory arrest even if they had probable cause.

19 However, while this case was on appeal, the Ninth Circuit issued a split decision in an  
 20 unpublished case, *Bini v. City of Vancouver*, 745 Fed. App'x 281 (9th Cir. 2018). The *Bini*  
 21 majority held that because *Ford* and *Acosta* seem to conflict, “[t]hese two holdings have resulted  
 22 in some confusion about the state of the law in this circuit.” *Id.* (citing district court decisions  
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<sup>2</sup> *Ford* was issued in February 2013.

1 that found no clearly established right). The majority stated that “[i]t appears self-evident that, if  
2 district courts in our circuit have had significant difficulty identifying the rule established by our  
3 cases, our precedent did not ‘place[ ] the . . . constitutional question beyond debate.’” *Id.*  
4 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

5 The dissent argued that *Acosta* was “determining the state of the law as it stood in 2006,  
6 when Acosta was arrested. . . . The decision has nothing to say about the state of the law in 2014,  
7 when Bini was arrested.” *Id.* at 283. The dissent noted that by the time the officer acted in 2014,  
8 “*Ford* had resolved whatever uncertainty remained in our circuit’s case law.” *Id.*

9 While I agree with the dissent’s analysis, I do not feel free to ignore the majority’s  
10 conclusion that the law was not clearly established under *Skoog* and *Ford*. I therefore grant  
11 Tucker’s motion for summary judgment based on qualified immunity.

12 **III. CONCLUSION**

13 I THEREFORE ORDER that plaintiff Gail Sacco is DISMISSED as a plaintiff in this  
14 action.

15 I FURTHER ORDER the defendant’s motion for summary judgment (**ECF No. 227**) is  
16 **GRANTED**. The clerk of court is instructed to enter judgment in favor of defendant Christopher  
17 T. Tucker and against plaintiffs Brian Ballentine, Catalino Dazo, and Kelly Patterson, and to  
18 close this case.

19 DATED this 20th day of August, 2020.



20  
21 ANDREW P. GORDON  
22 UNITED STATES DISTRICT JUDGE  
23